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12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION  
16

17 CROWN CELL INC.,  
18 Plaintiff,  
19 v.  
20 ECOVACS ROBOTICS, INC.  
21 Defendant.

Case No.3:21-cv-07890-SI

**DEFENDANT ECOVACS  
ROBOTICS, INC.'S NOTICE OF  
MOTION AND MOTION TO  
DISMISS CROWN CELL INC.'S  
SECOND AMENDED COMPLAINT**

Date: April 1, 2022  
Time: 10:00 a.m.  
Crtrm.: 1

The Honorable Susan Illston

Complaint Filed: October 7, 2021

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that on April 1, 2022 at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 1 on the 17th floor of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Susan Illston presiding, Defendant Ecovacs Robotics, Inc. (“Defendant” or “Evocacs”) will and hereby does move the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing Plaintiff’s Second Amended Complaint (“SAC”).

Defendant’s Motion to Dismiss (the “Motion”) is made on the following grounds: (1) Plaintiff’s First Claim for Relief for fraud and misrepresentation does not sufficiently plead intent and is barred by the economic loss doctrine; (2) Plaintiff’s Second Claim for Relief for breach of express warranty does not allege a breach and is barred because Plaintiff never gave Ecovacs notice of any defective vacuums prior to bringing this lawsuit; (3) Plaintiff’s Third Claim for Relief for breach of implied warranties fails because Plaintiff’s sole remedy is Ecovacs’ Limited Warranty, the parties are not in vertical privity, and because Plaintiff never gave Ecovacs notice of any defective vacuums; and (4) Plaintiff’s Fourth Claim for Relief for declaratory judgment is moot because Ecovacs provides here in writing that it will not sue Plaintiff for trademark infringement as to any authentic vacuums that it purchased from its distributor, NETi, on the dates alleged in the SAC.

The Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, all pleadings, papers and other documentary materials in the Court’s file for this action, those matters of which this Court may or must take judicial notice, any oral argument, and such other matters as the Court may consider.

1 Dated: March 4, 2022

Respectfully submitted,

2 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

3  
4 By

/s/ Laura L. Chapman

LAURA L. CHAPMAN

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6 Attorneys for Defendant

7 Ecovacs Robotics, Inc.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This motion stands for the proposition that “third time is *not* the charm.”

Plaintiff’s Second Amended Complaint (“SAC”), like the two complaints before it, fails. This one fails for the following reasons:

The first claim for relief, alleging fraud and misrepresentation, fails because the claim is barred by the economic loss doctrine and also because Plaintiff does not sufficiently allege “intent” as required by Rule 8(a).

The second claim for relief, alleging breach of express warranty, fails for two reasons. First, the claim does not allege the critical element of breach, or any facts that support a breach. Second, Plaintiff did not contact Ecovacs within a reasonable time after allegedly discovering that the vacuums did not work. As a matter of law, a plaintiff who fails to provide a manufacturer this notice (and an opportunity to cure) is barred from asserting a claim for breach of express warranty. *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 817 (N.D. Cal. 2014); *see also* Cal. Com. Code § 2607(3)(A).

The third claim for relief, alleging breach of implied warranties, fails for four reasons. First, Ecovacs expressly disclaims any implied warranties; Plaintiff’s sole remedy is Ecovacs’ Limited Warranty. Second, Ecovacs and Plaintiff are not in vertical privity of contract. Third, Plaintiff does not allege a breach. Finally, Plaintiff failed to give Ecovacs notice of any defects to give Ecovacs an opportunity to cure the defects within a reasonable time before filing suit.

The fourth, and last, claim for relief, alleging non-infringement of Ecovacs’ trademarks fails because there is no actual controversy. Ecovacs does not intend to sue Plaintiff as to vacuums it purchased from Ecovacs’ distributor, NETi.

At this point, enough is enough. For the above reasons, Plaintiff’s entire SAC should be dismissed with prejudice.

### II. PROCEDURAL HISTORY

On October 7, 2021, Plaintiff filed its original Complaint, asserting the

1 following claims for relief: (1) Declaratory Judgment for Trademark Non-  
2 Infringement; (2) Intentional Interference with Contractual Relationships; and (3)  
3 Injunctive Relief.<sup>1</sup> (Dkt. 1.)

4 On January 7, 2022, Defendant filed a motion to dismiss the second claim for  
5 intentional interference with contractual relationships on the grounds that Ecovacs'  
6 complaint to Amazon constituted protected speech under California's anti-SLAPP  
7 law. (Dkt. 12.) On January 21, 2022, Plaintiff filed a First Amended Complaint,  
8 (Dkt. 16) to moot the motion to dismiss. That same day, Plaintiff filed an opposition  
9 to Ecovacs' motion to dismiss, which did not challenge the merits of Ecovacs' motion  
10 to dismiss, but, merely stated that the motion is moot because Plaintiff amended its  
11 complaint. (Dkt. 17.) On January 28, 2022, Ecovacs filed a reply brief stating that  
12 this Court should still rule on the merits of Ecovacs' motion to dismiss because  
13 California's anti-SLAPP case law provides that attorney fees are still recoverable  
14 when a plaintiff amends a complaint if the anti-SLAPP motion is meritorious, and  
15 Plaintiff did not oppose the merits of the motion. (Dkt. 18.)

16 Plaintiff's first amended complaint alleged the following claims for relief: (1)  
17 fraud and misrepresentation; (2) breach of express warranty; (3) breach of implied  
18 warranties; and (4) declaratory judgment for non-infringement of Ecovacs'  
19 trademarks. Plaintiff omitted the claim for intentional interference with contractual  
20 relationships, on which Ecovacs filed an anti-SLAPP motion.<sup>2</sup>

21 On January 25, 2022, counsel for Ecovacs contacted Plaintiff by email stating  
22 that the first amended complaint was deficient because it failed to provide the details

---

23  
24 <sup>1</sup> Ecovacs denies the claims in Plaintiff's original complaint.

25 <sup>2</sup> Plaintiff's factual allegations in the SAC and FAC are contradictory to those in the  
26 original complaint. In the original complaint, Plaintiff claimed that Ecovacs caused  
27 Amazon to temporarily suspend Plaintiff's account, thereby causing Plaintiff lost  
28 profits because it could not sell the vacuums. In the FAC and SAC, Plaintiff claims  
that Ecovacs damaged Plaintiff because the Ecovacs vacuums Plaintiff sold on  
Amazon were returned to Plaintiff at a high rate because they were defective.

1 of the claimed fraud, such as who made the allegedly false statements, and when and  
2 how the statements were made. In that email, Ecovacs also stated that the breach of  
3 express warranty was subject to a motion to dismiss because it did not provide the  
4 details of the claimed warranty such as the exact terms of the warranty, and that the  
5 complaint does not include any details as to the number of units claimed to be under  
6 the warranty, or whether Plaintiff attempted to make a warranty claim to Ecovacs.  
7 Further, Ecovacs stated that it was evaluating other legal claims and reserved all rights  
8 to move for dismissal on other grounds. On January 27, 2022, the parties agreed that  
9 Plaintiff would file a second amended complaint with additional factual allegations  
10 and details in an attempt to avoid further motion practice.

11 On February 2, 2022, Plaintiff filed its Second Amended Complaint (“SAC”),  
12 (Dkt. 21). On February 6, 2022, Ecovacs informed Plaintiff that the complaint is still  
13 deficient because fraud is not sufficiently pled. Second, Ecovacs told Plaintiff that  
14 Ecovacs’ limited express warranty disclaims all implied warranties. Third, it stated  
15 that Plaintiff’s claim for breach of express warranty cannot be cured because the  
16 warranty is expressly issued to end users. Nonetheless, Plaintiff’s SAC still does not  
17 allege any facts stating that Plaintiff made a warranty claim to Ecovacs prior to filing  
18 suit, as required by law.

19 On February 11, 2022, Plaintiff responded to Ecovacs’ email, maintaining that  
20 its claim for fraud is adequately pled. It also claimed that the basis for Plaintiff’s  
21 express warranty claim is the repeated statements by Ecovacs that the vacuum  
22 cleaners were refurbished and that Ecovacs represented in its “end-user warranty” that  
23 the vacuum cleaners were free from defects when used under normal conditions.  
24 Plaintiff claimed that any affirmation made at the time of sale is treated as a warranty.  
25 Finally, Plaintiff stated that Ecovacs’ disclaimer of implied warranties is ineffective  
26 because no notice was provided to Plaintiff of the disclaimer. The parties meet and  
27 confer efforts ended there and Ecovacs now brings this motion to dismiss.

28

### 1 **III. SUMMARY OF ALLEGATIONS IN PLAINTIFF’S SECOND** 2 **AMENDED COMPLAINT**

3 As alleged in the SAC, Ecovacs is a manufacturer and provider of home  
4 robotics products, including vacuum cleaners. SAC, ¶ 18 (Dkt. 21). Ecovacs’  
5 vacuum cleaners bear the ECOVACS trademark. *Id.*, ¶ 19.

6 Plaintiff sells products on online marketplaces, such as Amazon. *Id.*, ¶ 38.  
7 Plaintiff has sold Ecovacs’ vacuum cleaners on Amazon. *Id.*

8 New England Technology, Inc. (“NETi”) distributes excess inventories for  
9 manufacturers, and is authorized by Ecovacs to sell its vacuum cleaners. *Id.*, ¶ 21.

10 Between August 2019 and December 2020, Plaintiff purchased 8,000 Ecovacs  
11 vacuum cleaners from NETi. *Id.*, ¶ 22. Plaintiff purchased these vacuums over a span  
12 of a year, over a seven-month period. *Id.*, ¶ 24. Invoices for these purchases were  
13 issued on or approximately August 5, 2019, December 10, 2019, February 29, 2020,  
14 March 31, 2020, May 14, 2020, June 22, 2020, and December 10, 2020. *Id.* Plaintiff  
15 does not allege that it purchased any vacuums from Ecovacs directly.

16 Prior to, and at the time that Plaintiff purchased the vacuums from NETi,  
17 Ecovacs allegedly represented to Plaintiff that the vacuums were refurbished units  
18 that were covered by a limited 90-day product warranty by Ecovacs to the end  
19 consumer. *Id.*, ¶ 23. The warranty provides that the vacuum cleaners would be free  
20 from defects in materials and workmanship when used under normal conditions. *Id.*

21 Plaintiff alleges that Ecovacs made these representations in two separate ways.  
22 First, the representation was allegedly made through the seven invoices issued from  
23 Plaintiff’s distributor NETi, each time Plaintiff purchased Ecovacs’ vacuums from  
24 this distributor. *Id.*, ¶ 23. Secondly, Plaintiff alleges that Ecovacs also made  
25 representations about the refurbished nature of the vacuum cleaners directly to  
26 Plaintiff through its National Sales Manager (Courtney Stecz) and its Head of Sales,  
27  
28

1 North America (Amy Cardona) via emails and telephone calls in and around mid-  
2 September 2019.<sup>3</sup> *Id.*

3 Plaintiff also alleges that the representation that the Ecovacs vacuums were free  
4 from defects in material and workmanship “was reiterated thousands of times”  
5 through the inclusion of the “ECOVACS ROBOTICS - Ninety (90) Day Refurbished  
6 Product Limited Warranty” with each vacuum cleaner that expressly warranted that  
7 the vacuum cleaner “will be free from defects in materials and workmanship when  
8 used under normal conditions.” *Id.*, ¶ 26. Plaintiff alleges that it received a high  
9 volume of returns because the vacuums that it purchased from NETi were not  
10 refurbished or adequately tested to verify functionality. *Id.*, ¶ 32.

11 Plaintiff also claims to be a third-party beneficiary to Ecovacs’ contract with  
12 Ecovacs’ distributor, NETi. *Id.*, ¶ 27. However, Plaintiff does not allege any facts  
13 supporting that it is a third-party beneficiary.

14 Plaintiff admits that Ecovacs has exclusive rights in the ECOVACS mark in the  
15 United States, which include rights as an exclusive licensee to use and enforce  
16 violations of the ECOVACS mark including the right to initiate litigation against  
17 infringers. *Id.*, ¶ 20. Plaintiff alleges that the vacuums it purchased from NETi are  
18 authentic and that it is lawfully permitted to resell the Ecovacs’ vacuums bearing the  
19 ECOVACS mark pursuant to the first sale doctrine. *Id.*, ¶ 28.

20 Lastly, Plaintiff alleges that on or about September 23, 2021, Ecovacs  
21 submitted a complaint to Amazon reporting that Plaintiff listed counterfeit Ecovacs  
22 vacuums on Amazon. *Id.*, ¶ 21. Plaintiff does not allege whether it continues to sell  
23 Ecovacs vacuums on Amazon, or that it intends to sell them in the future.

24  
25  
26 <sup>3</sup> Ecovacs denies that it made any representations to Plaintiff as alleged in the SAC.  
27 In fact, Ecovacs has investigated the allegations in the SAC and has discovered that  
28 all of Plaintiff’s claims are factually unsupported. However, for the purposes of this  
motion, this Court should accept all of Plaintiff’s allegations as true.

#### 1 IV. LEGAL STANDARDS

##### 2 A. Application of California Law

3 Federal courts sitting in California apply California substantive law when  
 4 exercising supplemental jurisdiction over state law claims. *Cove USA LLC v. No Bad*  
 5 *Days Enters., Inc.*, No. 8:20-cv-02314-JLS-KES, 2021 WL 3568251, at \*2 (C.D. Cal.  
 6 July 2, 2021) (citing *Mason and Dixon Intermodal, Inc. v. Lapmaster Int'l LLC*, 632  
 7 F.3d 1056, 1060 (9th Cir. 2011)). The parties do not dispute that this court has  
 8 supplemental jurisdiction over Plaintiff's state law claims alleged in the first, second,  
 9 and third claim for relief.

##### 10 B. Rule 12(b)(6) Legal Standards

11 A complaint should be dismissed if a plaintiff fails to plead sufficient facts "to  
 12 state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550  
 13 U.S. 544, 570 (2007); Fed. R. Civ. P. 12(b)(6). A complaint must set forth sufficient  
 14 facts which, when taken as true, raise more than a speculative right to relief. *Id.* at  
 15 555. "[N]aked assertion[s]," "labels and conclusions," or "a formulaic recitation of  
 16 the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
 17 (2009). Dismissal "is proper if there is a 'lack of a cognizable legal theory or the  
 18 absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation*  
 19 *Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011).

20 Although the court must accept as true all well pleaded allegations, *Love v.*  
 21 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989), it is not required to "assume the  
 22 truth of legal conclusions merely because they are cast in the form of factual  
 23 allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (quoting *W.*  
 24 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). "In order to survive a  
 25 dismissal motion, however, a plaintiff must allege facts that are enough to raise his/her  
 26 right to relief 'above the speculative level.'" *In re Dynamic Random Access Memory*  
 27 *(DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1134 (N.D. Cal. 2008) (citing  
 28 *Twombly*, 555 U.S. at 555). A plaintiff must allege "enough facts to state a claim that



1 is plausible on its face,” not just conceivable. *Twombly*, 555 U.S. at 570. “[T]he tenet  
2 that a court must accept as true all of the allegations contained in a complaint is  
3 inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.

4 Furthermore, “‘a plaintiff may plead [him]self out of court’” if he “plead[s]  
5 facts which establish that he cannot prevail on his claim.” *Weisbuch v. Cnty. of Los*  
6 *Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (quoting *Warzon v. Drew*, 60 F.3d  
7 1234, 1239 (7th Cir. 1995)). The court need not assume the validity of “allegations  
8 that contradict matters properly subject to judicial notice or by exhibit.” *Sprewell v.*  
9 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

### 10 C. Rule 9 Legal Standards

11 Federal Rules of Civil Procedure Rule 9(b) imposes the requirement on  
12 plaintiffs to allege fraud with particularity. Rule 9(b) states that: “In alleging fraud or  
13 mistake, a party must state with particularity the circumstances constituting fraud or  
14 mistake.”

15 “In order to properly plead fraud with particularity, the complaint must allege  
16 the time, and content of the fraudulent representation such that a defendant can  
17 prepare an adequate response to the allegations.” *In re Kimmel*, 324 F. App’x 550-51  
18 (9th Cir. 2008). The heightened pleading standard is commonly cited as requiring the  
19 allegations to identify “the who, what, when, where, and how of the misconduct  
20 charged.” *U.S. v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1167 (9th Cir. 2016);  
21 *see also Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

22 The Ninth Circuit in *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th  
23 Cir. 2003), made clear that: “Averments of fraud must be accompanied by ‘the who,  
24 what, when, where, and how’ of the misconduct charged.” *Id.* As one court  
25 explained: “Fraud is a serious charge, easy to allege and hard to prove. The rules  
26 therefore require pleading with particularity. It must be clear from the beginning that  
27 the plaintiff has specific details of what happened, when, where, and to whom.” *In re*  
28 *Doctors Hosp. of Hyde Park, Inc.*, 308 B.R. 311, 322 (Bankr. N.D. Ill. 2004). When



1 these details are missing, fraud claims are dismissed. *Id.*

2 *Vess*, 317 F.3d at 1107, applied the heightened pleading requirement to find  
 3 that: “A motion to dismiss a complaint or claim ‘grounded in fraud’ under Rule 9(b)  
 4 for failure to plead with particularity is the functional equivalent of a motion to  
 5 dismiss under Rule 12(b)(6) for failure to state a claim. If insufficiently pled  
 6 averments of fraud are disregarded, as they must be, in a complaint or claim grounded  
 7 in fraud, there is effectively nothing left of the complaint. In that event, a motion to  
 8 dismiss under Rule 12(b)(6) would obviously be granted. Because a dismissal of a  
 9 complaint or claim grounded in fraud for failure to comply with Rule 9(b) has the  
 10 same consequence as a dismissal under Rule 12(b)(6), dismissals under the two rules  
 11 are treated in the same manner.” *Vess* found that “it is established law in this and  
 12 other circuits that such dismissals are appropriate,” citing cases throughout the nation.  
 13 *Id.*

#### 14 **D. Rule 8(a) Legal Standards**

15 Malice, intent, knowledge, and other conditions of a person’s mind “may be  
 16 alleged generally.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 554 (9th Cir. 2007).  
 17 Allegations of intent must still satisfy the plausibility requirements of Rule 8(a). *See*  
 18 *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 n.5 (9th  
 19 Cir. 2014) (“[A]lthough the language of Rule 9 poses no barrier in itself to general  
 20 pleading of fraudulent intent, *Twombly* and *Iqbal*’s pleading standards must still be  
 21 applied to test complaints that contain claims of fraud.”).

22 Thus, under Rule 8(a), Plaintiff “must point to facts which show that defendant  
 23 harbored an intention not to be bound by terms of the contract at formation.” *UMG*  
 24 *Recordings, Inc. v. Glob. Eagle Entm’t, Inc.*, 117 F. Supp. 3d 1092, 1109-10 (C.D.  
 25 Cal. 2015); *see also Sherwin-Williams Co. v. JB Collision Servs., Inc.*, Nos. 13-CV-  
 26 1946-LAB-WVG, 13-CV-1947-LAB-WVG, 2014 U.S. Dist. LEXIS 145950, at \*27  
 27 (S.D. Cal. Oct. 10, 2014) (“[A]n action for deceit based on a false promise requires a  
 28 showing of specific intent; as a result, ‘[a] cause of action for a false promise should

1 plead facts to show the existence of two specific intentions of the promisor: an  
 2 intention to cause the promisee to act by reason of the promise, and an intention at the  
 3 time of the promise not to keep it.”)

4 Moreover, fraudulent intent cannot be inferred purely on a party’s failure to  
 5 perform its promises. *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 30 (1985). The  
 6 California Supreme Court has held that “something more than nonperformance is  
 7 required to prove the defendant’s intent not to perform his promise.” *Id.*<sup>4</sup>

#### 8 **E. Leave to Amend Should Be Denied When Futile**

9 Although leave to amend may be given freely, it should not be given where, as  
 10 here, amendment is futile. *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th  
 11 Cir. 1988). Futile amendments should not be permitted, and futility can, by itself,  
 12 justify the denial of a request for leave to amend. *U.S. Ex rel. Lee v. SmithKline*  
 13 *Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001).

#### 14 **V. THE FIRST CLAIM FOR RELIEF FOR “FRAUD AND** 15 **MISREPRESENTATION” SHOULD BE DISMISSED**

16 To plead fraudulent misrepresentation, Plaintiff must allege the following: (1)  
 17 misrepresentation, (i.e., false representation, concealment, or nondisclosure); (2)  
 18 knowledge of falsity, or scienter; (3) intent to defraud, (that is, to induce reliance); (4)  
 19 justifiable reliance; and (5) resulting damage. *Miller v. Ghirardelli Chocolate Co.*,  
 20 912 F. Supp. 2d 861, 875 (N.D. Cal. 2012). *Ashton v. J.M. Smucker Co.*, No. EDCV  
 21 20-992 JGB (SHKx), 2020 U.S. Dist. LEXIS 250428, at \*34 (C.D. Cal. Dec. 16,  
 22 2020).

23 To state a valid claim, plaintiff “must show that Defendant’s promises were

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24  
 25 <sup>4</sup> The California Supreme Court has also cited to circumstantial evidence that may  
 26 create an inference of fraudulent intent not to perform a promise: “fraudulent intent  
 27 has been inferred from such circumstances as defendant’s insolvency, his hasty  
 28 repudiation of the promise, his failure even to attempt performance, or his continued  
 assurances after it was clear he would not perform.” *Id.* (citing Prosser, Torts § 109,  
 pp. 764-65 (5th ed. 1984)).

1 made without any intention to perform.” *R Power Biofuels, LLC v. Chemex LLC*, No.  
 2 16-CV-00716-LHK, 2017 U.S. Dist. LEXIS 47129, at \*27 (N.D. Cal. Mar. 29, 2017).

3 Here, Plaintiff does not sufficiently plead intent, and leave to amend should not  
 4 be granted because this claim is also barred by the economic loss doctrine.

5 **A. Plaintiff’s Claim for Fraud and Misrepresentation is Barred by the**  
 6 **Economic Loss Rule**

7 Plaintiff’s claim for fraud and misrepresentation fails because it is not based on  
 8 facts independent from its second claim for breach of express warranty. According  
 9 to the economic loss rule, “no tort cause of action will lie where the breach of duty is  
 10 nothing more than a violation of a promise which undermines the expectations of the  
 11 parties to an agreement.” *Oracle USA, Inc. v. XL Global Servs.*, No. C 09-00537  
 12 MHP, 2009 U.S. Dist. LEXIS 59999, at \*4 (N.D. Cal. Jul. 13, 2009); *see also*  
 13 *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) (“The  
 14 economic loss rule requires a purchaser to recover in contract for purely economic  
 15 loss due to disappointed expectations, unless he can demonstrate harm above and  
 16 beyond a broken contractual promise.”). In sum, to state a valid fraud and  
 17 misrepresentation claim, Plaintiff must allege “conduct . . . [that] violates a duty  
 18 independent of the contract arising from principles of tort law.” *Erlich v. Menezes*,  
 19 21 Cal. 4th 543, 551 (Cal. 1999).

20 The purpose of the rule is to “prevent[ ] the law of contract and the law of tort  
 21 from dissolving one into the other.” *Robinson Helicopter*, 34 Cal. 4th at 988 (internal  
 22 quotation marks and citation omitted). To avoid the economic loss doctrine, the  
 23 tortious conduct must be “completely independent of the contract or arise[] from  
 24 conduct which is both intentional and intended to harm.” *Id.* at 990. “Where there  
 25 are well-developed contractual remedies, such as the remedies that the Uniform  
 26 Commercial Code (in force in all U.S. states) provides for breach of warranty of the  
 27 quality, fitness, or specifications of goods, there is no need to provide tort remedies  
 28 for misrepresentation.” *Giles v. GMAC*, 494 F.3d 865, 876 (9th Cir. 2007) (quoting

1 *All Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865-66 (7th Cir. 1999)).

2 Here, Plaintiff's claim for fraud and intentional misrepresentation is a mere  
3 regurgitation of its second claim for breach of express warranty (i.e., that Ecovacs'  
4 vacuums will work without defect when used in normal conditions for 90 days) (SAC,  
5 ¶¶ 24-26)). To plead fraud, Plaintiff alleges that "it was represented to Crown Cell  
6 by Ecovacs, individually and through its authorized distributor, NETi" that the  
7 vacuum cleaners were refurbished units that were covered by a limited product  
8 warranty that the vacuum cleaners would be free from defects in materials when used  
9 under normal conditions for 90 days. (SAC, ¶ 23.) **Plaintiff does not allege any**  
10 **harm or misrepresentation beyond the fact that the refurbished vacuums it**  
11 **purchased were not functioning like Plaintiff expected a refurbished vacuum to**  
12 **perform.** Thus, Plaintiff's first claim is barred by the economic loss rule because  
13 Plaintiff does not allege a single misrepresentation that is *independent* from its breach  
14 of express warranty claim.

15 Further, any claimed exceptions to the economic loss rule must be pled or they  
16 are waived. *See R Power Biofuels*, 2017 U.S. Dist. LEXIS 47129, at \*18, n.2.  
17 Plaintiff does not plead an exception to the economic loss rule in its SAC and therefore  
18 waives exceptions.

19 In sum, this court should dismiss Plaintiff's first claim with prejudice without  
20 leave to amend because the claim is barred by the economic loss doctrine as a matter  
21 of law.

## 22 **B. Plaintiff's Claim for Fraud and Misrepresentation Fails to** 23 **Sufficiently Plead "Intent"**

24 Plaintiff also failed to plead any facts showing Ecovacs had an intent to defraud  
25 Plaintiff. Under Rule 8(a), Plaintiff "must point to facts which show that defendant  
26 harbored an intention not to be bound by terms of the contract at formation." *UMG*  
27 *Recordings*, 117 F. Supp. 3d at 1109-10; *see also Sherwin-Williams*, 2014 U.S. Dist.  
28 LEXIS 145950, at \*27.

1 As explained above, nonperformance alone will not support a finding of fraud.  
2 See *Tenzer*, 39 Cal.3d at 30 (“something more than nonperformance is required to  
3 prove the defendant’s intent not to perform his promise”); see also *Mat-Van, Inc. v.*  
4 *Sheldon Good & Co. Auctions, LLC*, No. 07-CV-912 - IEG (BLM), 2007 U.S. Dist.  
5 LEXIS 54876, at \*19 (S.D. Cal. July 27, 2007) (“In the instant case, the only  
6 allegations in the complaint that could demonstrate defendants’ fraudulent intent are  
7 claims that defendant ultimately did not perform the material terms of the contract.  
8 Plaintiffs’ reliance on nonperformance as circumstantial evidence of defendants’  
9 fraudulent intent at the time of contract formation is misplaced”); *Sunnyside Dev. Co.,*  
10 *LLC v. Opsys Ltd.*, No. C 05-0553 MHP, 2005 U.S. Dist. LEXIS 39303, at \*17-18  
11 (N.D. Cal. Aug. 8, 2005) (“[T]he mere fact that a party breaches a promise to perform  
12 a condition of contract is as a matter of law insufficient to give rise to an inference  
13 that the breaching party acted with fraudulent intent at the time that the promise was  
14 made”); *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1153-54 (S.D. Cal. 2001)  
15 (merely alleging that defendant breached a contract did not adequately plead that it  
16 entered into the agreement with no intent to perform).

17 In the SAC, Plaintiff’s fraud and misrepresentation claim merely recites the  
18 elements of the claim, without more. Plaintiff alleges that the vacuums sold by  
19 Ecovacs were not refurbished as warranted, that Plaintiff relied on Ecovacs’  
20 representation that they were refurbished when it purchased them from NETi, and  
21 alleges that Ecovacs always knew that the vacuums were not refurbished. (Dkt. 21 at  
22 50-52.) Plaintiff does not plead any facts that support an inference that Ecovacs acted  
23 with intent to defraud Plaintiff or that it never intended to sell non-defective,  
24 refurbished vacuums to NETi. Plaintiff’s claim for fraud and misrepresentation  
25 therefore fails.

1 **VI. THE SECOND CLAIM FOR RELIEF FOR BREACH OF EXPRESS**  
 2 **WARRANTY SHOULD BE DISMISSED**

3 California Commercial Code § 2313(1)(a) explains that the term “express  
 4 warranty” covers “[a]ny affirmation of fact or promise made by the seller to the buyer  
 5 which relates to the goods and becomes part of the basis of the bargain creates an  
 6 express warranty that the goods shall conform to the affirmation or promise.” Such  
 7 warranties apply to “transactions in goods.” *See* Cal. Comm. Code § 2102; *see also*  
 8 Cal. Civ. Code § 1791.2(a)(1) (defining “express warranty” as “[a] written statement  
 9 arising out of a sale to the consumer of a consumer good pursuant to which the  
 10 manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or  
 11 performance of the consumer good or to provide compensation if there is a failure in  
 12 utility or performance”).

13 “An express warranty is a term of the parties’ contract.” *Lee v. Toyota Motor*  
 14 *Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 978 (C.D. Cal. 2014) (citing *A.A. Baxter*  
 15 *Corp. v. Colt Industries, Inc.*, 10 Cal. App. 3d 144, 153 (1970)).

16 The elements for a breach of express warranty claim are: (1) that the seller made  
 17 statements that constituted an “affirmation of fact or promise” or a “description of the  
 18 goods”; (2) that the statement was “part of the basis of the bargain”; and (3) that the  
 19 warranty was breached. *Cal. U. Com. Code* Section 2313.

20 In particular, “a plaintiff must allege: (1) the exact terms of the warranty, (2)  
 21 reasonable reliance thereon, and (3) a breach of warranty which proximately caused  
 22 plaintiff’s injury.” *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 U.S. Dist.  
 23 LEXIS 13187, at \*5 (N.D. Cal. Feb. 10, 2011) (citing *Williams v. Beechnut Nutrition*  
 24 *Corp.*, 185 Cal. App. 3d 135, 142 (1986)); *Hauck v. Advanced Micro Devices, Inc.*,  
 25 No. 18-CV-00447-LHK, 2018 U.S. Dist. LEXIS 185070, at \*20 (N.D. Cal. Oct. 29,  
 26 2018).

27 In order to plead the exact terms of the warranty, the plaintiff must “identify a  
 28 specific and unequivocal written statement about the product that constitutes an



1 explicit guarantee.” *Hadley v. Kellogg Sales Co.*, 273 F. Supp. 3d 1052, 1092 (N.D.  
 2 Cal. 2017) (internal quotations omitted); *Hauck*, 2018 U.S. Dist. LEXIS 185070, \*20.  
 3 This requires alleging facts constituting the “‘specifics’ about what the warranty  
 4 statement was, and how and when it was breached.” *T&M Solar & Air Conditioning,*  
 5 *Inc. v. Lennox Int’l Inc.*, 83 F. Supp. 3d 855, 875 (N.D. Cal. 2015) (quoting *Minkler*,  
 6 65 F. Supp. 3d at 816-17).

7 Here, Plaintiff alleges that each Ecovacs vacuum cleaner that it purchased  
 8 included a limited 90-day express warranty providing that the vacuum cleaner “will  
 9 be free from defects in materials and workmanship when used under normal  
 10 conditions.” (SAC, ¶ 23.) Plaintiff alleges that many of the vacuums were defective,  
 11 but does not allege when Ecovacs breached the express warranty. *Id.*, ¶ 31.

12 **A. Merely Alleging that the Vacuums Were Not Free From Defects**  
 13 **Does Not Constitute a Breach of Warranty Under the Law**

14 Plaintiff alleges that the vacuums were not free from defects as allegedly  
 15 promised in Ecovacs’ limited express warranty and therefore Ecovacs breached its  
 16 warranty. (SAC, ¶¶ 58-61.) Even if the vacuums were not free from defects, that fact  
 17 alone does not give rise to a breach of express warranty claim. *Kent v. Hewlett-*  
 18 *Packard Co.*, No. 09-5341 JF PVT, 2010 U.S. Dist. LEXIS 76818, at \*14-15 (N.D.  
 19 Cal. July 6, 2010) (finding that limited warranty language that laptop would be “free  
 20 from defects” did not mean that “recurring failures” in laptop would be considered as  
 21 breaches of the limited warranty because HP did not warrant that the laptop’s  
 22 operation would be “uninterrupted or error-free”).

23 The plaintiff in *Kent* brought a breach of express warranty claim after it  
 24 discovered that the laptops it purchased from the defendant were not defect free. *Id.*  
 25 The *Kent* court explained that “HP is not liable for breach of express warranty merely  
 26 because a product manifests recurring failures during the warranty period. Rather,  
 27 the question is whether Plaintiffs sought repairs, refunds, or replacements and, if so,  
 28 whether HP responded appropriately under the warranty.” *Id.* at \*15-16.

1 Similarly, in *Ferranti v. Hewlett-Packard Co.*, the court considered a breach of  
 2 express warranty claim to be premised not on the “defect-free” language of the  
 3 warranty, but rather on whether the defendant responded appropriately in remedying  
 4 any problems with the product. No. 13-cv-03847 EJD, 2014 U.S. Dist. LEXIS  
 5 131249, at \*17 (N.D. Cal. Sept. 16, 2014) (“HP argues that its one-year limited  
 6 warranty is a warranty for repairing and replacing the product, not a promise that the  
 7 use of the printer will be uninterrupted and error free.”).

8 Here, in its first amended complaint, Plaintiff did not allege that it made a  
 9 warranty claim to Ecovacs after it allegedly discovered that the vacuums had recurring  
 10 failures and were thus not defect free. Counsel for Ecovacs met and conferred with  
 11 Plaintiff’s counsel about this deficiency in the FAC. Plaintiff then filed its SAC,  
 12 which still does not allege that it made a warranty claim to Ecovacs. As explained  
 13 above, Plaintiff does not state a viable claim for breach of express warranty as a matter  
 14 of law by simply alleging that the vacuums it purchased from NETi were defective.

15 **B. Plaintiff is also Barred from Bringing this Claim Because it Did**  
 16 **Not Provide any Notice to Ecovacs or Give Ecovacs an**  
**Opportunity to Cure**

17 The California Commercial Code § 2607 provides “a ‘buyer must, within a  
 18 reasonable time after he discovers or should have discovered any breach [of  
 19 warranty], notify the seller of breach or be barred from any remedy.” *Minkler*, 65  
 20 F. Supp. 3d at 817 (quoting Cal. Com. Code § 2607); *see also* Cal. Com. Code  
 21 § 2607(3)(A). The Ninth Circuit has explained that “[t]o avoid dismissal of a breach  
 22 of contract or breach of warranty claim in California, ‘[a] buyer must plead that notice  
 23 of the alleged breach was provided to the seller within a reasonable time after  
 24 discovery of the breach.’” *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir.  
 25 2011) (citation omitted).

26 The purpose of providing such pre-suit notice is “to allow the defendant  
 27 opportunity for repairing the defective item, reducing damages, avoiding defective  
 28 products in the future, and negotiating settlements. The notice requirement also



1 protects against stale claims.” *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 380  
 2 (Cal. 1974); *accord Alvarez*, 656 F.3d at 932 (“The purpose of giving notice of breach  
 3 is to allow the breaching party to cure the breach and thereby avoid the necessity of  
 4 litigating the matter in court.”).

5 Nowhere in the SAC does Plaintiff allege that notice of the alleged breach was  
 6 provided to the seller within a reasonable time after discovery of the breach. For this  
 7 reason alone, its breach of express warranty claim fails to state a claim.

8 **VII. THE THIRD CLAIM FOR RELIEF FOR BREACH OF IMPLIED**  
 9 **WARRANTIES SHOULD BE DISMISSED**

10 Plaintiff’s third claim for breach of implied warranties seems to allege two  
 11 types of implied warranties were breached: the implied warranty of merchantability  
 12 and the implied warrant of fit for particular purpose.

13 “The implied warranty of merchantability arises by operation of law rather than  
 14 contract.” *In re Nexus 6P Prods. Liab. Litig.*, 293 F. Supp. 3d 888, 925 (N.D. Cal.  
 15 2018) (citing *Hauter v. Zogarts*, 14 Cal. 3d 104 (1975)). The implied warranty  
 16 guarantees not that the goods “precisely fulfill the expectation of the buyer,” but  
 17 instead that the goods meet “a minimum level of quality.” *Am. Suzuki Motor Corp.*  
 18 *v. Superior Court*, 37 Cal. App. 4th 1291, 1296 (1995) (citation omitted). “The core  
 19 test of merchantability is fitness for the ordinary purpose for which such goods are  
 20 used.” *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297, 1303 (2009) (citation  
 21 omitted).

22 To state a claim for a breach of the implied warranty of fitness for a particular  
 23 purpose, a plaintiff must allege “(1) the purchaser at the time of contracting intends  
 24 to use the goods for a particular purpose, (2) the seller at the time of contracting has  
 25 reason to know of this particular purpose, (3) the buyer relies on the seller's skill or  
 26 judgment to select or furnish goods suitable for the particular purpose, and (4) the  
 27 seller at the time of contracting has reason to know that the buyer is relying on such  
 28 skill and judgment.” *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2016 U.S. Dist.

1 LEXIS 34164, at \*58 (N.D. Cal. Mar. 15, 2016) (quoting *Frenzel v. AliphCom*, 76  
2 F. Supp. 3d 999, 1021 (N.D. Cal. 2014)).

3 Plaintiff's breach of implied warranties claim fails for four reasons. First, the  
4 Limited Warranty alleged in the Complaint supersedes any implied warranty. Where  
5 the contract sets out a remedy, and "the remedy is expressly agreed to be exclusive,"  
6 then it is the "sole remedy." Cal. Com. Code § 2719(1)(b). Second, Ecovacs  
7 expressly disclaimed all implied warranties in its Limited Ninety (90) Day Warranty.  
8 Third, the parties are not in vertical privity of contract. Finally, Plaintiff does not  
9 allege a breach and did not give Ecovacs notice of the alleged defects to give Ecovacs  
10 an opportunity to repair or replace the vacuums, as promised in its limited warranty.

11 **A. The Court May Take Judicial Notice of the Ecovacs Limited**  
12 **Warranty**

13 Judicial notice under Rule 201 permits a court to notice an adjudicative fact if  
14 it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is "not subject  
15 to reasonable dispute" if it is "generally known," or "can be accurately and readily  
16 determined from sources whose accuracy cannot reasonably be questioned." Fed. R.  
17 Evid. 201(b)(1)-(2).

18 Hence, "[a] court may take judicial notice of matters of public record without  
19 converting a motion to dismiss into a motion for summary judgment." *Lee v. City of*  
20 *Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (quotation marks and citation  
21 omitted). "But a court cannot take judicial notice of disputed facts contained in such  
22 public records." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir.  
23 2018).

24 Here, the parties do not dispute the terms of Ecovacs' limited express warranty.  
25 (See Ex. 1 to Defendant's Request for Judicial Notice.) However, Plaintiff does not  
26 include the full terms of Ecovacs' limited warranty or attach it as an exhibit to its  
27 Complaint. For this reason, Ecovacs requests the Court to take judicial notice of the  
28 full terms of the limited warranty.

1 During the parties meet and confer efforts, Ecovacs informed Plaintiff that  
2 Ecovacs' limited warranty disclaims all implied warranties by law. Plaintiff does not  
3 dispute the terms of the disclaimed warranties, but maintains that it still has a claim  
4 for implied warranties because Plaintiff never had notice of the disclaimer. Ecovacs  
5 requests this Court to take judicial notice of the Ecovacs' limited warranty which  
6 includes a disclaimer of implied warranties, which placed Plaintiff on notice.  
7 Ecovacs' limited warranty is referenced in the Complaint and the Court should  
8 consider the full text of the warranty in deciding this Motion. *See Khoja*, 899 F.3d at  
9 999. For the court's ease of reference, the text of the Ecovacs 90-Day Limited  
10 Warranty is reproduced below in pertinent part:

11 **“Ninety (90) Day Refurbished Product Limited Warranty**

12 CERTIFIED REFURBISHED PRODUCTS Limited Warranty –  
13 ECOVACS Robotics, Inc. warrants you, the original purchaser, that the  
14 ECOVACS product that you purchased will be free from defects in  
15 materials and workmanship when used under normal conditions for  
16 three (3) months from the product purchase date. This Limited  
17 Warranty applies only to certified refurbished products purchased and  
18 used in the United States and Canada. Some states/jurisdictions do not  
19 allow limitations on the duration of an implied warranty, so the above  
20 limitation may not apply to you.

21 NO OTHER WARRANTIES – ECOVACS Robotics, Inc. does  
22 not warrant the functions contained in the ECOVACS product will meet  
23 your requirements. The entire risk as to the quality and performance of  
24 the ECOVACS product is with you. To the maximum extent permitted  
25 by applicable law, ECOVACS Robotics, Inc. and its suppliers disclaim  
26 all other warranties, either express or implied, including, but not limited  
27 to, implied warranties of merchantability and fitness for a particular  
28 purpose, with regard to the ECOVACS product and the accompanying

1 written materials. This Limited Warranty gives you specific legal  
2 rights. You may have others which vary between states/jurisdictions.”

3 See Ex. A to Ecovacs’ Request for Judicial Notice.

4 **B. Ecovacs Expressly Disclaims Implied Warranties**

5 During the parties’ meet and confer efforts, Plaintiff asserted that Ecovacs’  
6 disclaimer of implied warranties do not apply to Plaintiff because Plaintiff never had  
7 notice of the disclaimer. This is irrelevant because Ecovacs’ “limited” express  
8 warranty supersedes any implied warranty. Where the contract sets out a remedy,  
9 and “the remedy is expressly agreed to be exclusive,” then it is the “sole remedy.”  
10 Cal. Comm. Code § 2719(1)(b). Here, the sole remedy available to Plaintiff is to have  
11 the vacuums repaired or replaced. Plaintiff did not seek any of the available remedies  
12 from Ecovacs before filing this lawsuit. More, the full terms of Ecovacs’ limited  
13 warranty reveal any claims for breach of implied warranties are disclaimed by law.

14 **C. Plaintiff Cannot Claim Breach of Warranty Because it is Not in**  
15 **Privity of Contract with Ecovacs.**

16 In California, “[t]he general rule is that privity of contract is required in an  
17 action for breach of either express or implied warranty and that there is no privity  
18 between the original seller and a subsequent purchaser who is in no way a party to the  
19 original sale.” *H.L. v. Wal-Mart Stores, Inc.*, No. EDCV 15-1056 JGB (KKx), 2015  
20 U.S. Dist. LEXIS 199452, at \*21-22 (C.D. Cal. Sept. 9, 2015) (citing *In re Clorox*  
21 *Consumer Litig.*, 894 F. Supp. 2d 1224, 1236 (N.D. Cal. 2012), quoting *Burr v.*  
22 *Sherwin Williams Co.*, 42 Cal. 2d 682, 695 (Cal. 1954)).

23 California courts have recognized several exceptions to this rule, *see Clemens*  
24 *v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). Plaintiff asserts one  
25 of the exceptions in its SAC. Specifically, the relevant exception is applicable “where  
26 the purchaser of a product relied on representations made by the manufacturer in  
27 labels or advertising material” and the plaintiff brings his breach of warranty claim  
28 pursuant to “the theory of express warranty.” *Burr*, 42 Cal. 2d 696. Here, Plaintiff

1 alleges that it relied on Ecovacs' representation that the vacuums were warranted to  
2 work for 90 days or Ecovacs would replace or repair the defect.

3 However, the exception does not apply to claims for breach of implied  
4 warranties. The privity exception based on representations appearing on labels and  
5 in advertising is not applicable to claims for breach of implied warranty. *H.L.*, 2015  
6 U.S. Dist. LEXIS 199452, at \*23 (dismissing claims for implied warranties for lack  
7 of vertical privity between plaintiff and the manufacturer because the plaintiff  
8 purchased the product from a reseller).

9 Plaintiff does not allege that it is a party to Ecovacs' contract with Ecovacs'  
10 distributor, NETi, or allege that it is a named party to Ecovacs' contract with NETi.  
11 Since the parties are not in vertical privity here, Plaintiff cannot state a claim for  
12 breach of implied warranties as a matter of law.

13 **D. Plaintiff Did Not Give Reasonable Notice to Ecovacs that its**  
14 **Vacuums Were Defective to Give Ecovacs an Opportunity to**  
**Cure**

15 Like its second claim for relief, Plaintiff's third claim for breach of implied  
16 warranties fails because Plaintiff never gave Ecovacs any notice that it breached any  
17 implied warranties, let alone the reasonable notice that is required by law. *Grausz v.*  
18 *Kroger Co.*, No. 19-CV-449 JLS (AGS), 2020 U.S. Dist. LEXIS 260667, at \*35 (S.D.  
19 Cal. Mar. 3, 2020) (dismissing plaintiff's claims for breach of express and implied  
20 warranties because plaintiff did not allege that she satisfied the notice requirement  
21 under California Commercial Code § 2607).

22 **VIII. THE FOURTH CLAIM FOR DECLARATORY JUDGMENT**  
23 **OF NO TRADEMARK COUNTERFEITING SHOULD BE**  
**DISMISSED**

24 Plaintiff's fourth claim for declaratory judgment of no trademark counterfeiting  
25 fails to allege a substantial controversy between the parties. Ecovacs allegedly  
26 submitted one complaint to Amazon that Plaintiff sold counterfeit Ecovacs products.  
27 Amazon allegedly temporarily suspended Plaintiff's Amazon account and Ecovacs  
28 did not submit any other complaints to Amazon since then. This single instance does

1 not show that Ecovacs is prepared to enforce its rights on Plaintiff. Further, Ecovacs  
 2 is informing Crown Cell now, here in this written brief, that it will not sue Plaintiff  
 3 for trademark infringement as to the vacuums it purchased from NETi on all the dates  
 4 alleged in the SAC. *Crossbow Tech., Inc. v. YH Tech.*, 531 F. Supp. 2d 1117, 1124  
 5 (N.D. Cal. 2007) (dismissing declaratory relief action of no patent infringement,  
 6 where, as here, allegedly accusing party provided covenant not to sue). The facts here  
 7 are similar to those in *Crossbow*. Ecovacs, like the defendant in *Crossbow*, has stated  
 8 in writing that it will not sue Crown Cell for trademark infringement as to any Ecovacs  
 9 refurbished vacuums that it purchased from NETi on the dates alleged in the SAC.  
 10 The result here should therefore also be the same. Thus, due to the lack of any other  
 11 actual controversy, this Court should dismiss the declaratory relief claim with  
 12 prejudice.

### 13 **IX. CONCLUSION**

14 For the foregoing reasons, Ecovacs respectfully requests that the Court dismiss  
 15 Plaintiff's Second Amended Complaint in its entirety without leave to amend.

16  
 17 Dated: March 4, 2022

Respectfully submitted,

18 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

19  
 20 By /s/ Laura L. Chapman

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23 Ecovacs Robotics, Inc.